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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 187

FRED ISAACS AND HARRY ISAACS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 188

BENSON M. LARRICK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 189

EARL A. JEFFORDS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 194

FRED A. OSSANNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. J. App. 1–65) is reported at 301 F. 2d 706. The opinion of

the district court (Pet. J. App. 67–86), overruling motions for judgments of acquittal or in the alternative for a new trial, is not reported.[1]

JURISDICTION

The judgments of the court of appeals were entered on March 22, 1962 (Pet. J. App. 111-115). Petitions for rehearing were denied on April 20, 1962 (Pet. J. App. 117–118). On May 1, 1962, Mr. Justice White extended the time for filing petitions for writs of certiorari to and including June 19, 1962 (Pet. J. App. 119). The petitions in Nos. 187, 188 and 189 were listed on June 18, 1962. The petition of Ossanna (No. 194) was filed on June 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's findings that petitioners were engaged in one overall scheme to defraud a corporation by looting its assets.

2. Whether the instructions misled the jury upon the basic issues in the case.

STATEMENT

Petitioners were charged in the District of Minnesota with various offenses resulting from a scheme to defraud. A 17-count indictment, returned September 18, 1959, charged petitioners Ossanna, Larrick,

[1] The record on file with the clerk of the court consists of the trial transcript, the original papers and proceedings in the district court, and the proceedings in the court of appeals, including a transcript of the oral argument. The trial transcript contains 72 volumes, separately paginated, and is herein designated "R.", preceded by the volume number.

Harry Isaacs and two others with mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), interstate transportation of stolen goods (18 U.S.C. 2314), and conspiracy to commit these offenses (18 U.S.C. 371). Petitioner Jeffords was charged in the same indictment under the conspiracy count only. A second single-count indictment, charging the identical conspiracy, was returned on January 20, 1960, against the petitioner Fred Isaacs, and another.

All the petitioners were found guilty of participating in the conspiracy. Petitioners Ossanna and Larrick were also convicted on eleven of the twelve substantitive counts submitted to the jury and Harry Isaacs was convicted on nine additional counts. The prison sentences imposed against all petitioners can be supported by the verdict on conspiracy count.[2]

1. THE SCHEME CHARGED

The indictment charged a scheme to defraud the Twin City Rapid Transit Company and its subsidiaries, the corporate complex operating the transit system in the Minneapolis-St. Paul area. The overall scheme, and each of the transactions alleged, involved the disposition of property which had become surplus as a result

[2] Ossanna and Harry Isaacs were each sentenced to four years' imprisonment and fined $11,000—a $1,000 fine on the mail and wire fraud counts and a fine of $10,000 on the interstate transportation and conspiracy counts (72 R. 33–34, 45–46). Larrick was sentenced to two years' imprisonment and fined $3,000—a $1,000 fine on the mail and wire fraud counts and $2,000 on the interstate transportation and conspiracy counts (72 R. 52–53). Jeffords was sentenced to imprisonment for eighteen months and fined $1,500 (72 R. 54–55) and Fred Isaacs was sentenced to imprisonment for one year and a day and fined $2,500, on the conspiracy convictions (72 R. 56).

of the conversion of the transit system from streetcars to buses. The indictment particularized the following fraudulent transactions, as parts of the scheme: (1) transfer of track, overhead structures and underground cable, now surplus, to the American Iron and Steel Company for grossly inadequate considerations; (2) payment of unearned commissions to petitioner Jeffords upon the sale of three parcels of surplus real estate; (3) allowance of excessive discounts and payment of false commissions in connection with the sale of eight guaranteed promissory notes of a Mexican company received by Transit in payment for surplus streetcars; (4) sale of real property known as the "Hopkins Right-of-way", supporting a now abandoned streetcar line, at an inadequate price; and (5) sale of surplus lots for less than one-fourth their value to the defendant[3] Towey. It was also charged that the American Iron and Steel Company, having become obligated to the Transit Company to resurface some Minneapolis streets, "would be relieved of such obligations without consideration and at the expense of the Transit Companies."

2. THE EVIDENCE

The evidence is set forth in detail in the opinions of the court of appeals (Pet. J. App. 4–5, 12–34) and of the district court (Pet. J. App. 69–77). Fraud in the transfer of scrap to American Iron and Steel Company, in the payment of commissions, and in the sale of real estate, is not disputed. The facts may be briefly summarized as follows:

[3] Towey was not tried because of illness.

In 1951, petitioner Ossanna became president of the transit company after a stockholders' committee, which included defendant Towey and petitioner Jeffords, successfully ousted the prior management in a proxy fight (2 R. 37, 88–89, 117; 40 R. 87, 123). Defendant Towey became a company officer with the advent of the Ossanna administration (3 R. 6). A decision to convert the transit operation from streetcar to buses (6 R. 36–37, 52–54) made surplus the property used in streetcar operations, including streetcars, the tracks upon which they ran, the cables, wires, and other property needed to supply the cars with power, the power plant furnishing the power, the rights-of-way used by the cars, the barns used for storage and other real property connected with the streetcar operations.

In March 1952, petitioner Larrick was employed to conduct the conversion program and was placed in charge of the scrap resulting from the conversion (4 R. 125, 135–137; 6 R. 123). In February 1954, he became a director of the transit company (57 R. 49).

a. Beginning in mid-1951 and extending to August 1955, the transit company disposed of trolley wire, streetcar tracks, underground cable and various miscellaneous items used in streetcar operations as scrap metal to the American Iron and Steel Corporation, a company controlled and managed by petitioner Harry Isaacs and petitioner Fred Isaacs, his son. Inadequate consideration was paid for the "scrap", especially the underground cable. For these transactions, the transit company, under the direction of

Ossanna and Larrick, abandoned accounting procedures and permitted no supervision or control over scrap disposition (8 R. 60; 5 R. 104; 7 R. 184–185; 26 R. 10, 13–17, 26–27).

Initially the scrap was transferred under a letter agreement consummated in August 1961, entered into by Ossanna and Harry Isaacs for their respective companies, under which American agreed to remove all rail and overhead wire of abandoned streetcar lines without cost to the transit company, repaving the streets when necessary, in exchange for all the material removed (6 R. 79). American repaved only one street under the agreement, receiving extra compensation for that work (9 R. 38–39; 40 R. 39–40). In February 1952, the companies entered into a formal contract covering eight streetcar lines. Again American was required to repave in exchange for the material removed (6 R. 94–102; Pet. J. App. 101–106). But American removed no additional steel rails from streets which would have required paving (50 R. 115–116). In August 1952, in an addendum to the contract (Pet. J. App. 106–108), seven more lines were added, American assuming no repaving obligation. On January 2, 1953, a second addendum to the contract (Pet. J. App. 109–110) purportedly gave American the right to retain all underground cable after removal, though Ossanna had already been informed that the copper and lead in the cables was worth $1,000,000 and could be removed at a cost of approximately $50,000 (6 R. 36–40). Larrick had been apprised of a valuation placed upon this cable (17 R. 85–86, 106–107, 125–127).

In July 1953, Harry Isaacs represented to the transit company that the removal contract was unprofitable and asked to be released (9 R. 55). In August 1953, at the urging of Ossanna, the Board of Directors of the transit company authorized Ossanna to make adjustments with American (9 R. 52-54). In October 1953, the transit company entered into an agreement with the City of Minneapolis under which the company was to pay the city $922,790 for repaving the streets over its rails and agreed to expend an additional $300,000 for special work required to remove items such as streetcar switches from the streets (51 R. 132–134; 21 R. 56–75; Pet. J. App. 87–100).

After the major portion of the streetcar lines had been abandoned, it became possible to remove the underground cable. In 1954, over 6,000,000 pounds of the 8,000,000 pounds of cable in the system was taken from the ground (Ex. JT). Cable worth $938,000 was sold to American for only $122,500. This result was accomplished by resorting to false weighing and underpricing (Exhibit KR; 25 R. 88–89, 99–100). Transit crews removed the cable from the ground and it was hauled by American trucks to its yards (12 R. 4, 87–88; 14 R. 44–45). There it was given false weights under the immediate direction of Fred Isaacs (16 R. 30, 38–39, 44–45, 56–57, 124–125; 22 R. 21–22). Larrick, who visited American offices frequently, required that all tickets showing weights be forwarded to him (8 R. 78–79; 22 R. 133–135). Ossanna and Larrick allowed American to price the metal received (4 R. 124–125, 135–137; 22 R. 131–144; 26 R. 90–91),

representing to the transit company's board of directors that the company was being paid the market values for its scrap (40 R. 191–192).[1]

b. In 1954 and 1955, the transit company paid petitioner Jeffords, a real estate broker, $107,500 in "commissions" in connection with the sale of three parcels of real estate, for which he performed no services. In July 1954, when the company sold its street car power plant, he was paid $12,500 on a requisition signed by Larrick and Ossanna, initialed by defendant Towey. Ossanna had negotiated the sale and Larrick had participated in some of the discussions (37 R. 26–28, 52–55, 64–66, 69). In November 1954, Jeffords was given $20,000 on a requisition signed by Ossanna, based upon an unsupported claim that he had an exclusive sales contract (36 R. 80–85; 37 R. 82, 135). In January and February 1955, he was paid $35,000 and $40,000 on authorization of Ossanna, Larrick and Towey in connection with the sale of the property. The evidence disclosed that a false exclusive listing contract and false corporate minutes were used to justify and disguise this payment (38 R. 100–116). Of the $107,500 received by Jeffords, a total of $81,500 was withdrawn in cash on the various dates of deposit (39 R. 83–90, 100–102).

c. In May 1955, the company, acting through Ossanna and Towey, sold an abandoned streetcar right-of-way

[1] To support the conviction under the interstate transportation counts (14, 15, and 16), evidence was introduced that part of this scrap had been shipped in interstate commerce (23 R. 137, 140–141, 143; 24 R. 55–58).

(the Hopkins line) to co-conspirator Walter N. Carlson for $10,000 (35 R. 42–43, 79). This property had been appraised and valued at from $84,500 to $150,000 (34 R. 40–41, 117, 134–135, 160–161). Carlson, following negotiations in which Ossanna was active, sold the major portion of this tract for a total of approximately $126,000. Carlson paid over $52,000 of this amount to Ossanna's children, who in turn endorsed $30,000 to Ossanna and to an Ossanna-owned company (36 R. 31–32, 50, 53–54, 62–66). Petitioner Jeffords, who had acquired from Carlson an option to buy a small portion of this right-of-way, netted $14,000 on this transaction. After agreeing to pay $6,000 for the option, he was paid $8,000 for releasing a fraction of the optioned property and sold the balance for $12,000 (35 R. 49–53, 61, 63).

d. In 1953, the transit company had received promissory notes as partial payment for the sale of 91 surplus streetcars (28 R. 16, 29–38). These notes had been guaranteed by an agency of the Mexican government, and were financially sound (27 R. 77). In April and July 1955, the transit company, acting under authority of a board of directors which included Ossanna, Larrick, and Towey, sold four of the notes to one bank for $351,079.25, and the remaining four to another bank for $323,585.59 (29 R. 21–41, 149–150). Out of the proceeds of these two sales, George Francis was given amounts totalling $238,349.73 in April and August of

[5] The court instructed the jury that there was no evidence that Larrick or Harry Isaacs participated in this transaction (69 R. 60, 102–104).

1955 (29 R. 30–45; 30 R. 109–110).[6] In August 1955, $83,316.31, the amount of a transit check payable eight days earlier to Francis, was deposited in a bank account in the name of George A. Francis. About a week later $53,000 in cash was withdrawn from this account (29 R. 44–45, 30 R. 36–39, 45).

5. In 1953 or 1954, Larrick offered to sell cheaply certain lots in the Harriet streetcar right-of-way. Towey accepted his offer and bought a lot for $500, using the name of his uncle (33 R. 145–147, 85–88, 92). Approximately six months later, Towey sold the lot for $5,500 (33 R. 176–180). Ossanna, seconded by Larrick, offered a motion before the transit company's board of directors which approved the sale to Towey's uncle (44 R. 148).[7]

3. THE INSTRUCTIONS

The court charged the jury repeatedly that, if it did not find an overall scheme to defraud, it must acquit petitioners. For example, it charged (69 R. 104–105):

> I have emphasized throughout this charge that the Government relies on an overall scheme

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[6] Before the sales (at 92 and 87% of the face value), the transit directors, at the urging of Ossanna, adopted a resolution authorizing the sale of these notes at a 40% discount to George Francis (29 R. 141–147).

[7] Harry Isaacs was acquitted on the substantive counts arising out of the transaction.

[8] There was evidence that Harry Isaacs was a partner in the Mid-Continent Development and Construction Company which also acquired certain real estate and scrap from the transit company (31 R. 19–23, 40–50). See the court's instructions (69 R. 43–44).

to defraud, and unless that has been established as to the mail and wire fraud counts and the conspiracy count, the Government's case as to such counts must fail. In other words, even though some of the defendants were guilty of fraud or wrongdoing, and even though you may find certain combinations of defendants engaged in separate or distinct schemes to defraud the Transit Company, that is not the crime charged in the indictment as to these counts and would not support a verdict of guilty as to any of these defendants as to such counts.

For instance, there is no evidence that Harry Isaacs, or Larrick, or Blumenfield participated in the Hopkins right-of-way transaction, or the Villaume commission matter. There is no evidence that Jeffords participated in any transaction except his commission deals and some dealing in the Hopkins right-of-way. There is no evidence that Ossanna participated in the Towey transaction.

In order to find these men guilty of the mail and wire fraud counts, and the conspiracy count, you must find from the evidence, members of the jury, that there was initiated by one or more of these defendants an overall scheme to defraud the Transit Company during the conversion, and that the other defendants, or a defendant, with full knowledge of the scope and objects of the scheme, knowingly and wilfully became a part thereof and performed some affirmative act in furtherance thereof.

Therefore, although a defendant may not have known what may have been done by another defendant, if they are all intentional parties

> to a common overall scheme to defraud the Transit Company in the manner alleged in the indictment, with knowledge of its objects and purposes, then the act or acts of their fellow wrongdoers become his or their act or acts, if such acts are done in the furtherance of the scheme to defraud alleged during its existence.

The court repeated in its charge (69 R.111):

> If the evidence does not establish that there was beyond a reasonable doubt the overall scheme to defraud as alleged in the first count, then it would be your duty to return a verdict of not guilty as to all defendants on the mail fraud and wire fraud charge and the conspiracy count. * * *"

See also 69 R. 85–86, 106–108, 110–111, 119, 123, 130–131, 141–142, 151.

ARGUMENT

1. That petitioners' conduct was fraudulent and that each of them conspired with some of the others is not disputed. The claim is that, although the judge repeatedly told the jury that it could not convict the defendants unless it found that they were part of a single overall conspiracy and scheme to defraud, and although the court of appeals, in painstaking and exhaustive review of the evidence, concluded that the evidence supported the jury's verdict, nevertheless this Court should hold that the evidence did not establish a single scheme. There is no occasion to review the evidence in this regard.

The jury was justified in inferring—indeed the evidence compelled the conclusion—that there was one

overall scheme to defraud the transit company of the assets made surplus by the conversion from streetcars to buses. This conspiracy had as its central core the transit officials, "insiders" Ossanna, Larrick and Towey. But the "insiders" could not achieve their objectives alone. The broad and maturing conspiracy also required the aid of many "outsiders." Strangers to the company, involved in legitimate enterprises, were necessary partners to give the internal looting the outward appearance of arm's-length business dealings. It was their role to give a "guise of legitimacy" to the transactions of the "insiders".

Initially, since a scrap dealer was needed, Harry Isaacs and his son Fred joined the scheme. False weights and rigged prices permitted a fraud in underground cable alone of $815,000. As the overhead structures, rails and cable were removed, the streetcar rights-of-way from which this material was removed became saleable. Real estate agents became essential parties in disposing of these assets. With Jeffords, the means employed was a false claim for $107,500 in real estate commissions. With Carlson, the device used was an outright sale of realty, approximately $75,000 below its market value. In the disposal of the streetcars, instead of directly falsifying the sale, false commissions, amounting to $238,439, were invoked when the promissory notes received in payment were discounted. Finally, Towey was able to perpetuate a relatively minor fraud by pretending that a third party was buying a parcel of real estate. Common to all these transactions, and underlying them, was a

common scheme to use an inside position within the transit company to dispose of its assets improperly.

With respect to the "insiders", the complaint of prejudicial misjoinder has no semblance of a reasonable foundation. The whole scheme to mulct the company, from beginning to end, depended upon their informed and interested cooperation. The only basis for their complaint is that each of them was not shown to have directly participated in a particular (and minor) facet of the overall scheme.[9] But, this in no way affects the correctness of the jury's verdict. The fact remains that every one of the frauds was made possible only because the "insiders" used their control of the company to loot its assets. To this single general scheme, the "insiders" were so clearly central parties that no further discussion is warranted.

Nor is the situation really different with respect to the "outsiders"—Harry and Fred Isaacs, who benefited so substantially in the scrap deals, and Jeffords, who received more than $100,000 in commissions he did not earn. The jury's conclusion that they, also, were part of an overall scheme is fully justified.

It is true there was no showing that either Isaacs was involved in the real estate sales (aside from the investment of Harry Issacs in Mid-Continent) or that Jeffords was involved in the scrap sales. Each, to

[9] As already noted (supra, p. 11), the judge told the jury that Larrick was not shown to have been directly involved in the Hopkins transaction and that Ossanna was not shown to have participated in the Towey real estate purchase. This ruling was more favorable to Ossanna than the evidence required since, as appears from the Statement, he did, in fact, participate to some extent in the Towey transactions.

that extent, may have been interested only in his cut of the pie. But all three of them well knew that there would be no pie to cut without corrupt "insiders" in control of the company.

Indeed, the Isaacs almost admitted as much. In 1959, when Internal Revenue agents interviewed Fred and Harry Isaacs, Fred brought up the problematical case "[o]f a company like ours that stole from the Transit Company a lot but reported the profits," and inquired, "why is the Internal Revenue in on it? It's something for the stockholders." Harry Isaacs added, "We are not the only ones that got something for this company. How about that guy in St. Paul? How about Northern States Power?" (24 R. 132–133). And while there was no similar proof as to Jeffords, it is a reasonable inference that, as one of the stockholders' committee who put the directors in office, he knew what the "insider" directors must do to arrange his unjustified commissions.

The "outsiders" were necessarily aware that their share in the fraud depended on the larger plan of the "insiders" to loot the company's property. Their knowing and interested cooperation made them a part of the overall scheme. Like the salesmen in *Blumenthal* v. *United States*, 332 U.S. 539, each of the "outsiders" here, though actively interested only in his own (very substantial) share of the spoils, knew that his success depended on the fraudulent control of the company. It does not matter that they did not participate in every facet of the overall conspiracy, share

in all its details, or know the role or the identity of every co-conspirator. *Id.*, at 556–559.[10]

2. As noted in the Statement, American (the Isaacs company) assumed the obligation of resurfacing certain Minneapolis streets torn up by the removal of rails. But, by a later agreement between the city and the transit company, in the form of an ordinance, the city undertook to do the necessary repaving, at a cost of $922,790 to the transit company, which also agreed to expend $300,000 in special removal work. (Pet. J. App. 87–100). Thus American was never called upon to repave the streets. It was the government's theory that, by effectively shifting the financial burden of resurfacing from American to Transit, this agreement made it possible for American to obtain scrap at less than normal cost.[11] The government expressly dis-

[10] The general sentence imposed on Ossanna, Larrick and Harry Isaacs on the conspiracy count also rests on a conviction for the substantive offenses of interstate transportation of fraudulently obtained property (counts 14, 15, and 16). The court of appeals found it unnecessary to consider the validity of these sentences under the rule of *Lawn* v. *United States*, 355 U.S. 339, 359.

[11] Government counsel said in part (68 R. 65–66): "The Government doesn't claim that the conversion ordinance was a part of a scheme, but the Government does point out to you, though, the fact that after the conversion ordinance was passed nobody seemed to pay any attention, any further attention to this contract which was still in force and effect, and the Twin City Rapid Transit Company had to promptly go out and remove three hundred thousand dollars worth of rail or special work in the City of Minneapolis, and did they bill American Iron for that? That was American Iron's obligation to remove that under that contract, if the defense is correct. Did they do that? That's where the conversion ordinance comes into this picture, to see and examine for yourselves whether that

avowed any claim of fraudulent conduct between the city and the company in the enactment of the ordinance (68 R. 24, 65–66). The court correctly stated the government's contention that "American was relieved of its obligation to do any paving by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953, which, according to the Government, in effect relieved American of its obligation to remove the tracks and repave where necessary * * *" (69 R. 39–40; see also 69 R. 88–89; Pet. J. App. 120–121). Later, the court said (69 R. 137–138, Pet. J. App. 121–122):

> What about the ordinance passed by the City of Minneapolis to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, Government's Exhibit BZ? Or did American in good faith indicate its willingness to go forward with its obligations under this contract?

In these circumstances, petitioners' claim that the instruction misled the jury into believing that they could base their verdict on a finding of fraud in the procurement of the municipal ordinance is plainly without merit. Even standing alone, the reference to the ordinance is not open to this interpretation.

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contract meant anything, not whether the conversion ordinance was a part of the scheme, but whether the contract had any significance and what attention these defendants paid to that contract after the conversion ordinance was passed."

Certainly, in context, it could not be misconstrued. As the court of appeals said, "when considered in light of the issue that was litigated and what actually transpired, we are satisfied that it did not serve to misdirect the jury or submit an issue that was not supported by evidence." (Pet. J. App. 50).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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AUGUST, 1962.

U. S. GOVERNMENT PRINTING OFFICE: 1962